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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1717

ANTHONY RIZZO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Anthony Rizzo, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated May 23, 1973, which affirmed both a judgment of conviction for a violation of 21 U.S.C.§§ 173 & 174 (one sale of heroin hydrochloride), and the District Court's denial of a motion for a new trial.

Opinions Below

The Court of Appeals affirmed the conviction, after argument, without an opinion. The order of affirmance is set forth as Appendix A of this petition (1a). The opinions of the District Court, denying petitioner's motion for a new trial, are set forth as Appendices B (2a) and C (5a), of this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on May 23, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Regulatory and Constitutional Provisions Involved

Constitution

The case involves the petitioner's right to a fair trial under the Due Process clause of the Fifth Amendment to the United States Constitution which provides, in pertinent part, "that no person shall . . . be deprived of life, liberty, or property without due process of law. . . ."

Federal Rules of Criminal Procedure

The case involves Rule 33 of the Federal Rules of Criminal Procedure which provides:

> "The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period." (*As amended* Feb. 28, 1966, eff. July 1, 1966).

Second Circuit Rules for the Prompt Disposition of Criminal Cases

The case involves the Second Circuit Rules for the Prompt Disposition of Criminal Cases which, in pertinent part, provide as follows:

> "4. In all cases the government must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed."
>
> "5. In computing the time within which the government should be ready for trial under rules 3 and 4, the following periods should be excluded:
>
> * * *
>
> (c) the period of delay resulting from a continuance granted at the request of a prosecuting attorney if:
>
> (i) the continuance is granted because of the unavailability of evidence material to the government's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or
>
> (ii) the continuance is granted to allow the prosecuting attorney time to prepare

the government's case and additional time is justified by the exceptional circumstances of the case.

* * *

(h) other periods of delay occasioned by exceptional circumstances." (As adopted, January 5, 1971; effective July 5, 1971.)*

Questions Presented For Review

The Government retained the services of an informant who was instructed to arrange purchases of narcotics while under surveillance. One such purchase was allegedly made from one Fragliossi, who was, allegedly, aided and abetted by the petitioner. The informant, although available, was not called as a witness at the trial. Instead, the government's proof was based upon circumstantial evidence which was derived from the observations of Government agents.

Following the trial, it was learned that the reason the government did not call the informant as a witness was because he would have repudiated the government's theory of the case by claiming that Fragliossi and the petitioner were innocent of any crime since the informant, himself, had been the source of the narcotics and had pocketed the purchase money which had been supplied to him by the Government.

Within the above context, the following questions are presented for review:

1. Did the Government suppress evidence of material importance to the defense when it failed to disclose that: a) the informant would, if called as a witness, exculpate the petitioner; b) at the time of the underlying transaction, the

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* The Rules as set forth in the text were in effect at the time pertinent to this case. They may be found in Title 28, U.S.C.A., Court of Appeals Rules, Cumulative Pocket Part 1972. The Rules have since been superseded, effective October 1, 1972.

informant had been told that the transaction would not result in a prosecution and he would not be called as a witness; and c) the informant had been offered and received consideration for his cooperation beyond that sworn to by a Government agent at the trial?

2. Was the petitioner deprived of due process of law by virtue of the coercive pretrial tactics exerted upon the informant by the government in an effort to compel him to continue his "cooperation"?

3. Did the Government's lack of candor in securing an adjournment of the trial deprive the petitioner of due process of law and of a speedy trial, requiring a dismissal of the indictment?

4. Was the government's circumstantial evidence against the petitioner so tenuous as to have required a judgment of acquittal?

Statement of the Case

A. Introduction

The facts of this case are derived from the transcripts of two trials; in the first, the petitioner was a defendant; in the second he was not. Immediately following the petitioner's trial, there commenced before the same trial judge the trial of *United States* v. *Cuomo, et ano.* The informant, the government agents, and the prosecutor in *Cuomo* were the same as in the petitioner's case. *Cuomo* and his co-defendant were prosecuted with regard to an altogether different narcotics transaction, not alleged to involve the petitioner. In *Cuomo* the informant testified as a Court's witness, whereas in petitioner's case, the informant did not testify.

It was through the *Cuomo* trial that it was learned for the first time, *inter alia*, that, if called as a witness, the informant would have exculpated the petitioner. Moreover, it was learned that the Government was fully aware of that

fact prior to the petitioner's indictment, and, for that reason, had not called the informant as a witness at petitioner's trial.

Based upon the record of the *Cuomo* trial, and prior to petitioner's sentence, petitioner moved the District Court for a dismissal of the indictment or, alternatively, for a new trial, upon the theory that the prosecution had suppressed evidence of material value to the defense, and, in connection therewith, had mispresented the facts in securing a substantial delay of the petitioner's trial (A. 51, *et seq.*).* The record of the *Cuomo* trial was ordered by the District Court to be made a part of the record of petitioner's case in lieu of a separate hearing with regard to the post-trial motions (6a).

B. The Government's Proof At Petitioner's Trial

All of the Government's trial proof was derived from the testimony of agents of the Federal Bureau of Narcotics and Dangerous Drugs (BNDD). Their testimony was as follows:

At 11:30 A.M. on October 21, 1970, agents met with the informant, Michael Feinberg, searched him and his car, and gave him $10,000 in government funds. With the informant's knowledge, his activities throughout the subsequent events were, to the degree possible, secretly observed by the agents (R. 20-21).

The informant was followed to a Manhattan street corner where he was seen to converse with Louis Fragliossi (the co-defendant at trial). The two men parted, and the informant went to a nearby cafe where he was soon again joined by Fragliossi. About ten minutes later they again

* References to the transcript of petitioner's trial are preceded by "R."; references to the transcript of the *Cuomo* trial are preceded by "T."; references to Petitioner's Appendix in the Court of Appeals are preceded by "A."

parted and he was followed to a nearby Veterans Club, where he was observed talking with various persons, including the petitioner (R. 21-24, 104-105).

A while later, the informant returned to the cafe, where he was again joined by Fragliossi, and the two men went out and sat in the informant's car. About a half hour later, petitioner was observed driving a car in the area. Someone else (never identified) was following him in a Chevrolet. The Chevrolet parked and its driver entered petitioner's car (R. 25, 80).

Fragliossi and the informant had been sitting in the informant's car for about forty-five minutes when petitioner's car pulled up acros the street. Upon seeing this, Fragliossi exited the informant's car, went across to petitioner's car, and engaged in a very brief conversation. According to one of the agents:

> "[Petitioner's] hand came out of the driver's side window. Mr. Fragliossi extended his hand and I saw them touch. Then Mr. Fragliossi went back to the informant's car and drove off in an easterly direction" (R. 26-27).

The informant's car then proceeded to where the Chevrolet (*supra*) was parked. Fragliossi exited and was observed removing a brown paper bag from the trunk of the Chevrolet. He handed the bag to the informant, who then drove out of the area after making a U-turn (R. 81-82, 160). This maneuver caused the agents to lose sight of him for a brief period of time. They eventually caught up with him and followed him to the public street on which he had, allegedly, earlier been searched and provided with government funds. Upon exiting his car, the informant gave the agents a brown paper bag which was later ascertained to contain heroin. An alleged search of the informant and his car failed to uncover the money which had earlier been advanced to him (R. 21-28, 81-82, 160-162).

As the last of the above-described events were occurring, Fragliossi was observed to drive the Chevrolet to the Veterans Club. Additionally, petitioner was observed leaving the club with an unidentified male. Petitioner and the unidentified male entered petitioner's car, drove a number of blocks and parked. A passing agent observed an unascertainable quantity of currency on the front seat of petitioner's car. Shortly thereafter, petitioner and his companion drove back to the Veterans Club (R. 81-82, 106-107, 110-111).

The prosecution presented no evidence as to what any of the participants said to one another during the course of these events. No arrests were made until a number of months later, and none of the purchase money was ever recovered. No one was ever seen giving any money to the petitioner, and the agents were not able to testify that the money which had allegedly been observed on the front seat of petitioner's car was the same in quantity or in fact as that which had been given to the informant (R. 256-263).

C. The Petitioner's Defense

The defense relied upon the deficiencies in the government's proof. A basic defect existed in the prosecution's case with regard to the reliability of the informant. The informant may have had the heroin secreted in his car before the alleged transaction occurred, he may have exchanged it for the purchase money during the course of the two and a half hours that elapsed in the time period covered by the government's case. Although the agent in charge of the investigation claimed that he searched the informant and the informant's car prior to and after these events, cross-examination revealed that the search was only cursory in nature. Thus, the agent admitted that "I patted him down. That was it. I don't recall taking anything out of his pockets" (R. 40-41). With regard to the search of the informant's car, the agent testified:

> -"I checked under the front seat, the glove compartment, under the dashboard, and to the best of my recollection, Senior Investigator Kayner searched the back seat and then we had the informant open the trunk" (R. 41-42).

The agents did not take out the front or back seats of the informant's car, nor did they search the ashtrays (R. 42). The agent in charge does not recall if he did anything more than merely look into the trunk (R. 43).

The other agent, Kayner, testified that his search of the back seat consisted of feeling the place, "where the seat part of the back seat and the backing seat came together" (R. 154-155). With regard to the trunk, he testified that they "looked in the trunk" (R. 154-155, 162).

Moreover, the evidence only showed that the informant had dealings with the co-defendant Fragliossi. Assuming that all of the other deductions that the government sought to draw from the agents' observations were correct, there was no direct evidence that the petitioner knew or had reason to know that he was in the middle of a heroin transaction.

D. The Newly Discovered Evidence

Immediately upon the termination of petitioner's trial, the *Cuomo* trial commenced. At the outset of the trial, an attorney communicated with government and defense counsel, advising them that he had been retained by the informant for the purpose of bringing before the Court the informant's claim that he had "framed" various persons, including the petitioner and his co-defendant, and that these persons were, in fact, innocent of having engaged in any heroin transaction at the times alleged. In support of this assertion, the attorney produced a tape recorded interview which he conducted with the informant on September 27, 1972, the date of the verdict in petitioner's case (A. 54-67).

As a result of the various disclosures made in that statement, the informant was called as a Court's witness at the *Cuomo* trial and the following facts were developed: In December, 1968, the informant was arrested on a New York State narcotics charge for traffic in heroin. He was approached by a BNDD agent (the supervising agent in the petitioner's case), as follows:

> "Mr. Vecchione told me he understands I am in some kind of trouble with the State and says if I work along with him he will help me with my State problems. * * * He will get my case taken care of * * * which means I would be free * * * he would manage to get that wiped out. * * * The exact words were, 'I will take care of your case, don't worry about it'" (T. 1114).

According to the informant, the agent told him he was after "anybody whose name ends in 'A, E, I, O or U'." He also said that the informant would be paid for his efforts (T. 1115-1119), but that none of the purchases which were to be arranged would form the subject matter of prosecutions, and the informant need not be concerned that he would ever be called as a witness. The rationale for this latter assertion being that the function of the informant was solely to create leads by which the BNDD would be able to obtain intelligence data for investigations of wider scope (T. 1257, 1428-1432).

Based upon this last assurance, the informant decided that he had nothing to lose and much to gain by duping the agents into believing that he was complying with their wishes. Thus, he led them to believe that he was purchasing narcotics from different people on four separate occasions (T. 1119). In fact, however, the informant was luring innocent people, specifically including the petitioner and Fragliossi, into apparently innocent situations so as to make it appear to the agents that a narcotics transfer was

taking place (T. 2123, 2128, 2160, 2242-2244). This was possible because the informant was not searched before or after the transactions (T. 1124-6, 1233, 1238-9, 1321-5).*

The informant's actual sources of the narcotics which he used in these transactions were two former narcotics agents (T. 1326), and he placed the narcotics in the trunk of his car on the night before the transaction (Tr. 1326-1329).

E. The Suppression of the Evidence by the Government

1. The information known to the Government.

According to the informant, he had advised the agents and the United States Attorney's office of his own misconduct and of the petitioner's innocence at least as early as March 17, 1971 (T. 600, 1187, 1247-48, 1254-55, 1259, 1260-61).

An Assistant United States Attorney testified as a witness at the *Cuomo* trial and confirmed that on March 17, 1971 he and other government officials met with the informant for the purpose of having him testify before the grand jury and the following occurred:

> "Mr. Feinberg immediately stated that he would never testify. First he stated that he admitted that he was the paid informant in the particular cases I was talking about.
>
> * * * * *
>
> "I asked him if he would testify, as I said before, and he adamantly said he would not.
>
> * * * * *
>
> "He told me that he would not testify in any event against any of the people. He told me that

* In this regard, Feinberg contradicted the testimony of the other two government agents, who claimed that they conducted, to some extent, a search of his person and his automobile, *supra*, pp. 6, 7, 8-9.

> basically he had been told when he was the paid informant that his identity would never come out; he had been told that upon purchase of certain exhibits the proposed method of investigation was to have a subsequent introduction of an undercover agent who would purchase additional exhibits" (Tr. 1428-1432).*

Thereafter, according to the informant, he advised government agents that petitioner was innocent on at least fifty occasions. As late as September 11, 1972, he told the trial prosecutor of this (T. 1181, 1187, 1260-1261). Apparently, due to the fact that the trial prosecutor would make no effort to correct the injustice which would otherwise be done, the informant sought to contact the United States Attorney himself. He made repeated unsuccessful efforts in this regard down to a few days before giving the tape recorded statement to his attorneys (T. 1261, 1412-1419, 1422-1423).

None of this information was given to the defense by the informant prior to or during petitioner's trial. This was attested by both the informant (T. 1280, 1306), and by petitioner's counsel (T. 1284, 1289).

At the *Cuomo* trial, the informant categorically denied that he had threatened to perjure himself (by exculpating the defendants) if he were called as a witness (T. 1348). He also noted that, when he was unable to contact the United States Attorney, he did contact an FBI agent whom he knew, but to no avail (T. 1422-1423).

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* The attorney went on to testify that the informant had told him that he would perjuriously exculpate the defendants if necessary (Tr. 1432, *et. seq.*).

2. The Government's Affirmative Acts of Suppression and its Improper Use of the Informant For the Purpose of Delaying The Trial.

The indictment was filed on April 28, 1971, more than a month after the March 17th meeting with the prosecutors and agents. On June 10, 1971, the case was assigned to a trial judge, and on June 24, 1971, the government filed a notice of readiness for trial. On November 9, 1971, the Court ordered the government to file a bill of particulars. The trial was set to commence on May 1, 1972 (A. 1-2).

With two days remaining before the commencement of the trial, and without yet having filed its bill of particulars, the government moved, on April 28, 1972, for a 90-day adjournment of the trial, upon the representation that:

> "A material witness of the government has become unavailable and we are requesting, your Honor, a 90-day adjournment to provide an opportunity to make this individual available." *

Due to the other obligations of counsel, the trial had to be adjourned for a period of five months to September 25, 1972.

Contemporaneously with its application for an adjournment, but unbeknownst to the defense, the prosecutor filed with the Court his own sealed affidavit. In his response to the post-trial motions in this case, he has since described that affidavit as follows:

> "With respect to the speedy trial claim, defendants incorrectly speculate that the Government misled the Court into believing that Feinberg was essential to the Government's case and that the

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* As established at the *Cuomo* trial, the prosecutor was referring to the informant. In fact, the informant was continuously available to the prosecution all during the period in question, including April 28, 1972 and thereafter (T. 12, 168, 311, 1184-85).

> Government did not know where he was. The fact is, as is known to the Court, the Government filed a sealed affidavit in support of its application for a continuance. In it the Government explicitly stated the reason for its application. The Government stated that Feinberg was a material witness to the events charged in the indictment, and therefore his identity as an informant would be discovered at the trial. The Government stated that Feinberg was then engaged in significant investigations as an informant, which investigations would have to be terminated when his identity came out, and for these reasons, the Government stated that Feinberg was unavailable. The Government explicitly stated that Feinberg would *not* be a government witness" (A. 105).

As was later revealed at the *Cuomo* trial, *supra,* pp. 11-12, the informant was no longer cooperating with the Government with regard to any case and the prosecutor's office was fully aware of that fact. Therefore, both the reasons for the adjournment given in the presence of the defense, and those given to the Court privately, were simply untrue.

Also, unbeknownst to the defense, at the time of the application for the adjournment, the prosecutor had in his pocket a copy of the Government's bill of particulars which had not yet been served or filed. The bill, which had previously been dated "April , 1972" (*sic.*) was altered about April 11, 1972, and provided the following five items by hand to read September 8, 1972. It was served on or about September 11, 1972, and provided the following five items of information with regard to the crime charged:

> "1. In the vicinity of Montgomery Street, Grand Street and East Broadway in Manhattan.
>
> "2. At about 1:00 P.M. on October 21, 1970.
>
> "3. The Government asserts the defendant received the narcotics from an unknown person.

> "4. The Government asserts that the defendant both concealed and facilitated the concealment of the narcotics.
>
> "5. The Government further asserts that the defendant and Louis Fragliossi sold and facilitated the sale of the narcotics to Michael Feinberg" (A. 11-12).

As the time for trial approached, and the informant increased his efforts to convince government officials that the defendants were innocent, the government resorted to coercive tactics. It would appear less than coincidental that, on the very day that the government filed its bill of particulars and a second notice of readiness for trial (September 11, 1972), the informant was arrested and held as a material witness. It will be recalled that, a number of months earlier, the prosecutor had filed a secret affidavit with the Court stating that it was *not* going to use the informant as a witness (*supra*, pp. 13-14). Likewise, once the circumstances of the prior months had been revealed, during the *Cuomo* trial, the prosecutor admitted:

> "I anticipate that the defendants wish to use him (the informant) in their defense, and he will have, what they believe, perhaps, to have credible evidence that this was a frame-up and the events didn't take place" (T. 315).

During the trial, defense requests for "3500" material (18 U.S.C. § 3500) at the conclusion of the direct testimony of the government agent who had repeatedly conferred with the informant, did not produce any information concerning conferences in which Feinberg claimed: 1) that he had gone through his activities in this case under the impression that he would never be called to testify and that the defendants would not be prosecuted, and 2) that if called to testify, he would exculpate the defendants (see R. 35, 83).

When, during petitioner's trial, the defense sought to have the informant's identity revealed to the jury, the prosecutor objected to such disclosure in the interests of "protection of the informant" (R. 57), and said there was "no material reason" for the disclosure of his identity (R. 58), and:

> "I just wanted to point out *that I have known from agents* that the informant was still anxious for his name not to come out in court knowing what he knows, so he may believe at this point in time that defendants still aren't positive" (R. 59) [emphasis added.]

Due to objections interposed by the prosecution, the defense was not permitted to go into the origins of the informant's recruitment by the government, or into his prior criminal history or his demonstrated ability to obtain narcotics from sources other than the defendants (R. 48, 138, 279).

Although the defense speculated, at the points in the record just previously noted, that it would, if it could, demonstrate such motive and ability on the part of the informant, the prosecutor argued in opposition, *on September 27, 1972,* as follows:

> "I just point out the government objects. There is absolutely no relevancy whatever shown to the events charged in the indictment. As is well known, a criminal record cannot be used as evidence of credibility or not, *there not being any credibility of this man at issue.* We are really way out in left field. No cases cited. *This is really an unprecedented kind of smokescreen"* (R. 282) [emphasis added.]

During the trial, the prosecutor was well advised that the defense had no idea that the informant's testimony would

be helpful to the defense. Defense counsel exclaimed, on the record, as follows:

> "I am stuck with Feinberg. He was a cooperating buyer. He obviously doesn't have any testimony that is going to help me" (R. 40).

Similarly, when the prosecutor offered to produce the informant if the defense wished to call him as a witness, defense counsel responded: "He must be kidding" (R. 202).

Notwithstanding all of the above notice to the prosecution, when defense counsel called for the production of any "Brady" material [*Brady* v. *Maryland*, 373 U.S. 83 (1963)] with regard to the informant, the prosecutor responded that he had no material which was inconsistent with the Government's trial proof (R. 283-286).*

3. The consideration given to the informant, but not disclosed to the defense.

During his examination at petitioner's trial, the agent in charge of the investigation and who had arranged for the informant's assistance, testified as follows:

> "Q. Did the special employee, this Herbert Feinberg or Michael Feinberg, receive any other considerations from the government aside from money?
>
> "A. None that I know of. I don't recall any" (R. 67).

Defense counsel was not permitted to go into the question of a State Supreme Court case which was pending against Feinberg since before October 21, 1970 (R. 67).

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* During the course of its charge to the jury, the Court, in essence, advised the jury that the failure of either side to call Feinberg as a witness was a basis upon which the jury could conclude, *as to either side*, that Feinberg would have given testimony unfavorable to that side (R. 354). At the conclusion of the charge, the defense objected to that portion of the charge, and the objection was overruled (R. 370-372).

The Cuomo trial left no doubt that to the knowledge of the agent (T. 101-107, 1030-1034), and to the knowledge of the United States Attorney's staff (T. 1449 *et seq.*; Government Exhibit 3514—Cuomo Exhibit Q in evidence, T. 1520), that influence had been utilized to defer Feinberg's sentence in the State case, and that the prospect of that sentence being minimized was continually held out to Feinberg in exchange for his initial assistance and with the hope of securing his testimony.

Reasons for Granting the Writ

I

Our Statement of the Case, *supra*, establishes the following:

1. The government created a situation to ensnare the petitioner which depended, at least in part, upon the reliability of a criminal turned informant;

2. The informant was advised that his interaction with the petitioner would not result in a prosecution and he would never be held accountable for his performance;

3. When the informant was advised that his performance would be put to the test of a grand jury and a public trial, he refused to testify;

4. One possibility was that he was merely afraid to testify and so advised the government;

5. Another possibility was that he had manufactured a false case against the defendants so as to gain financial reward and to avoid imprisonment for a State offense, but when the moment of truth came, he falsely advised the Government that the reason he refused to testify was because he was afraid;

6. A third possibility was that he did, indeed, advise certain government agents that the cases were manufactured;

7. In any event, the government did not advise the defense of the change in the witness' story, and the defense was never given the opportunity to place the various possibilities before a jury for resolution;

8. Not even the Court was advised of the turn in events;

9. When the prosecution was advised of the problem, it sought to and did obtain an adjournment of this trial for many months, by misadvising the defense that a witness was "unavailable", and by secretly misadvising the Court that the informant was still doing undercover work;

10. Separate and apart from the above, the prosecution knew and did not reveal to the defense the fact that the witness, at the time of the development of this case, was under the impression that no prosecution would develop growing out of his activities—thus increasing the likelihood that he might manufacture a case;

11. Separate and apart from the above, a government agent testified that the only consideration received by the informant was the payment of money, when he well knew that the witness had received the additional consideration of a delay of a State sentence with the hope of a lenient termination of that case; moreover, the trial prosecutor was aware of this additional consideration and made no effort to correct the agent's testimony.

In short, petitioner contends that these discoveries constituted newly discovered evidence which entitled him to a new trial; additionally, it constituted a suppression of evidence by the prosecution in violation of petitioner's right to due process of law.

II

The evidence breaks down to the following favorable possibilities for the defense, and petitioner was deprived of the opportunity for the jury in his case to pass upon these facts:

> (A) The informant did, in fact, set up the defendants, and the defendants were, in fact, innocent of the charges against them;
>
> (B) The informant did, in fact, receive consideration from the government relating to the State prosecution;
>
> (C) The agents had, in fact, led the informant to believe that the incidents involved in this case would never be given the scrutiny of a public trial and Feinberg would never be held to answer for his conduct.

Items B and C appear, in fact, to be true and have not been contested by the government. If that is so, then the government wilfully suppressed material evidence which would be of value to the defense. In *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763 (1972), this Court had no difficulty in reversing a conviction where, innocently, a trial prosecutor failed to reveal a promise which had been made to a prosecution informant.

The materiality of the agents' claims to the informant that the cases would never come to prosecution, cannot be doubted. Such a promise was an invitation to create fake situations without fear of disclosure.

As to the informant's direct claims relating to the petitioner's guilt or innocence, it was not for the prosecutor to unilaterally determine where the truth lay. Judge Palmieri's decision granting a new trial in *Application of Kapatos*, 28 F. Supp. 883 (S.D.N.Y., 1962), has come to be a classic and

oft-cited statement of the duty of a prosecutor in a situation where he comes to learn evidence which may be of help to the defense, but which he does not believe:

> "The purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one. The average accused usually does not have the manpower or resources available to the State in its investigation of the crime. Nor does he have access to all of the evidence, much of which has usually been removed or obliterated by the time he learns that he is to be tried for the crime. In view of this disparity between the investigating powers of the State and the defendant, I do not think it imposes too onerous a burden on the State to require it to disclose the existence of a witness of the significance of Danise in the instant case. At the very least, the trial Judge should have been made aware of this evidence, and a ruling should have been requested by the prosecutor with respect to his duty in the premises. His unilateral decision to keep the evidence undisclosed invited the risk of error" (208 F. Supp. at 888).

If the informant's testimony is believed, then the agents in this case were either grossly mistaken or perjured themselves. It is of no small significance that these same agents were found to be unworthy of belief by a panel of the Court of Appeals in *United States* v. *Mele*, 462 F.2d 918 (2d Cir. 1972).

As stated in *United States* v. *Polisi*, 416 F.2d 573 (2d Cir. 1969):

> " * * * While the statements given by Cordero did not conclusively establish any perjury by Smith, Parks and Zaher, it is clear that there was a definite conflict in the versions of the role played by Anthony Polisi in the robbery operations. A new trial is

required even though Cordero's testimony 'probably' would not have produced a different verdict, Mesarosh v. United States, [352 U.S. 1 (1956)] even though the testimony is perhaps more relevant to punishment than guilt and even though the testimony's primary effect would only be to impeach the credibility of the accomplices, Alcorta v. Texas, [355 U.S. 28 (1957)].

"Moreover, the same conclusion would result even assuming that, at the time of trial, the government could well have legitimately concluded that Cordero's testimony was merely cumulative. Under Brady v. Maryland [373 U.S. 83 (1963)], we must look to the prejudice to the accused of the suppression, in its effect upon its preparation for trial. It is clear even under the standard indicated by this Court in United States v. Tomaiolo, [378 F.2d 26, 28 (2d Cir. 1967)], that the evidence suppressed was material and of substantive use to Anthony Polisi * * * " (416 F.2d at 578).

It is to be noted that, in the *Polisi* case, the witness Cordero was available to be called as a witness (416 F.2d 573, 575). As in *Polisi,* the defense in the present case had no reason to put the informant on the stand. *See also* the summary of recent authorities with respect to these issues as contained in *Shuler* v. *Wainwright,* 341 F. Supp. 1061, 1071-1072 (M.D. Fla., 1972).

The heart of the District Court's opinion denying the motion for a new trial is as follows:

"The Court here notes that the government has assumed that the supposedly favorable testimony which the witness would have given was in fact perjury, and that therefore it was under no obligation to disclose it to the defense. The Court does not agree with this position. However, in view of the

> fact that on two subsequent occasions this Court had the opportunity to observe and to hear the witness, and to note his effect on two trial juries, the Court is of the opinion that the harm resulting to the defendant Rizzo, if any, from the failure of the government to disclose Mr. Feinberg's 'change of heart' to the defense does not warrant the granting of a new trial. The Supreme Court held in *United States* v. *Giglio*, 405 U.S. 150, that a new trial was not required when the combing of the prosecutor's files after trial disclosed evidence 'possibly useful to the defense but not likely to have changed the verdict.' Such seems to be the situation here" (3a-4a).

While appearing to concede that the prosecution suppressed evidence which should have been disclosed to the defense, the District Court concluded that the error was harmless. We respectfully submit that the Court misunderstood the opinion in *Giglio, supra,* as applied to each of the three distinct acts of suppression practiced in the present case, as outlined *supra,* at p. 20. Each of the facts suppressed went to the reliability of the facts which the agents thought they observed. Additionally, the suppression of the informant's claim that the incident never occurred, went to the credibility of the Government agents; the failure of Agent Vecchione to admit that the informant received consideration with respect to the State prosecution went to Vecchione's credibility as an important Government eye-witness; and the suppression of the fact that the agents had led the informant to believe that this case would not result in a prosecution, went to the credibility of the prosecution as well as the credibility of the particular agents involved.

No objective view of the facts can lead a reasonable man to conclude that the jury was properly informed as to the underlying facts. In suppressing those facts, the prosecu-

tion did so at its peril. If the informant had not come forward, those facts would not be known today, and this would merely be another case closed with no one the wiser. We respectfully submit that a conviction obtained by such means should not be permitted to stand.

III

As shown, *supra,* at pp. 13-14, when faced with the informant's refusal to be a cooperative witness, the Government sought and obtained an adjournment of the trial upon allegations which were untrue.

While appearing to take advantage of the exceptions noted by Rule 5 of the *Second Circuit Rules Regarding the Prompt Disposition of Criminal Cases* (*supra,* pp. 3-4), the Government, in fact, used those exceptions as a pretense for the purpose of gaining additional time during which it sought to coerce the informant into testifying as a government witness. By this maneuver, the government compelled a delay of more than five months; the petitioner was thus brought to trial more than two years after the alleged crime and more than a year and a half after the indictment.

Petitioner submits that the means by which this delay was procured, as well as the Government's disingenuous last minute arrest of the informant as a material witness (*supra,* p. 15), had the effect of preventing a disclosure of the suppressed evidence and denied petitioner due process of law and a speedy trial, requiring a reversal of his conviction and a dismissal of the indictment. *Barker* v. *Wingo,* 407 U.S. 514 (1972); *Dickey* v. *Florida,* 398 U.S. 30 (1970). *Cf. Strunk* v. *United States,* — U.S. — (June 11, 1973).

IV

As revealed by our Statement of Facts, *supra*, at pp. 6-9, the Government's case against the petitioner was circumstantial and highly tenuous. There was no evidence that he had actual knowledge that he was associating with persons who were about to or had engaged in a narcotics transaction. As characterized by the trial judge:

> "What you really have, I think, counsel, is a chain of scant facts" (R. 219).

This Court has repeatedly held that mere association is not a sufficient basis upon which to predicate the guilt of a defendant. In *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949), the court quoted Judge Learned Hand's holding in *United States* v. *Peoni*, 100 F.2d 410, 412 (2d Cir. 1938):

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'"

Only gross speculation would warrant the conclusion that the petitioner's conduct in this case fulfills the above-quoted requirements. In *Scales* v. *United States*, 367 U.S. 203, 224-225 (1961), this Court made clear that a mere showing of association, without more, will not satisfy the reasonable doubt standard:

> "In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow) that relationship must be sufficiently sub-

> s'antial to satisfy the concept of personal guilt in order to withstand attack under the due process clause of the Fifth Amendment." See also: *United States* v. *Falcone,* 109 F.2d 579 (2d Cir. 1940), aff'd 311 U.S. 205.

That standard was not established in this case, and the case should not have been permitted to go to the jury.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should issue, the judgment of conviction should be reversed, and the indictment should be ordered dismissed, or a new trial should be ordered.

Respectfully submitted,

MAURICE EDELBAUM,
Attorney for Petitioner

HENRY J. BOITEL,
Of Counsel.

June 15, 1973

APPENDIX A

Order of Affirmance of the Court of Appeals (May 23, 1973)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of May, one thousand nine hundred and seventy-three.

Present: HON. IRVING R. KAUFMAN
HON. JOHN S. KILKENNY
HON. JAMES L. OAKES
Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ANTHONY RIZZO, LOUIS FRAGLIOSSI and JOHN DOE,
Defendants,

ANTHONY RIZZO and LOUIS FRAGLIOSSI,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX B

Memorandum Opinion and Order Denying Defendant Rizzo's Post Trial Motions (January 2, 1973)

LAWRENCE W. PIERCE, D.J.

MEMORANDUM OPINION

Defendant Anthony Rizzo has moved for an evidentiary hearing and new trial based on newly discovered evidence and the alleged suppression of material evidence by the prosecution. Defendant Rizzo was found guilty of violating 21 U.S.C. §§ 173-174 by a jury on September 27, 1972, and this motion was heard on the scheduled date of sentencing, November 27, 1972.

Defendant Rizzo asserts that the government suppressed evidence it knew was favorable to the defendant, and that evidence elicited in a subsequent trial qualifies as newly discovered evidence which requires the granting of a new trial.

In opposition, the government contends that it had no obligation to reveal that the witness had stated that he would perjure himself in retaliation for the government's disclosure of his name as an informant (pursuant to this Court's order); and that the government made known it would not call the witness as its own, but nevertheless made him available to defense counsel for interview or as a defense witness, although he had been designated a material witness for the government. The government contends that under *Brady*, it was under no obligation to "spell out that Feinberg said he would tell lies favorable to the defense."

This Court is of the opinion that both parties have made unwarranted assumptions, but having weighed the merits it concludes that the defendant's motion must be denied. The newly discovered evidence to which defendant Rizzo alludes

came out in a trial immediately following the conviction. In that second trial (defendant Rizzo's was the first in a series of three trials in which the government's case was essentially the same, but involving different defendants), this Court had the opportunity to hear the testimony of the witness in question (having called him as a Court's witness), and, in the third trial as well, this Court heard Mr. Feinberg's testimony, he having been called therein by the defense.

The issue basically involves the credibility of the witness. The defense suggests several hypotheses explaining why the witness testified as he did, some of which may be favorable to the defendant herein. However, those explanations which may be favorable to the defendant are not the only plausible ones, nor even the most probable ones. (It is well to note here that the juries in the second and third cases, being the sole judges of credibility, and having seen and heard the witness testify in each case, returned verdicts of guilty against the defendants in those latter cases.) Since this Court has had the opportunity to hear and observe the witness in each of those trials, and knows his testimony is the basis for the instant motion, it concludes that defendant Rizzo's motion for an evidentiary hearing and a new trial must be denied.

The Court here notes that the government has assumed that the supposedly favorable testimony which the witness would have given was in fact perjury, and that therefore it was under no obligation to disclose it to the defense. The Court does not agree with this position. However, in view of the fact that on two subsequent occasions this Court had the opportunity to observe and to hear the witness, and to note his effect on two trial juries, the Court is of the opinion that the harm resulting to the defendant Rizzo, if any, from the failure of the government to disclose Mr.

Feinberg's "change of heart" to the defense does not warrant the granting of a new trial. The Supreme Court held in *United States* v. *Giglio*, 405 U.S. 150, that a new trial was not required when the combing of the prosecutor's files after trial disclosed evidence "possibly useful to the defense but not likely to have changed the verdict." Such seems to be the situation here.

In addition to the motion for a new trial based on newly discovered evidence, defendant Rizzo orally moved for the setting aside of the verdict because he was denied a speedy trial. There is no merit to this position. As the government points out in its opposing papers, the actual delay was not excessive (being only five months), there was no prejudice suffered by defendant resulting from this delay, and the commitments of defendant Rizzo's own attorney to other matters necessitated equally lengthy adjournments of the trial date. Finally, defense counsel for Rizzo did not object to the adjournment granted on April 28, 1972, but merely indicated that because of further commitments he had, the adjournment would have to be almost twice as long as the government had requested.

In conclusion, defendant Anthony Rizzo's motions for a new trial and for setting aside of the verdict for lack of a speedy trial are both denied.

SO ORDERED.

Dated: New York, New York
January 2, 1973

/s/ LAWRENCE W. PIERCE
U.S.D.J.

APPENDIX C

Memorandum Opinion and Order Denying Defendant Fragliossi's Post Trial Motions (January 2, 1973)

LAWRENCE W. PIERCE, D.J.

MEMORANDUM OPINION

Defendant Louis Fragliossi has moved this Court for an order setting aside the verdict for dismissal of the indictment on the ground that he was denied his right to a speedy trial; the granting of a new trial on the ground that the government suppressed evidence favorable to the defendant; and an order staying the imposition of sentence pending a Supreme Court decision. Defendant's motions are denied.

Although defendant Fragliossi objected to the adjournment of the trial date from May 1, 1972 to September 25, 1972, when that adjournment was granted in April, 1972, he has not made the requisite showing of prejudice resulting from the delay, nor has he shown that it was an undue delay. A five month delay, in and of itself, is not *per se* an unreasonable delay.

Secondly, Mr. Fragliossi urges that the government suppressed evidence which, if believed by the jury, would have been favorable to him. While it is questionable that the government had the right and authority to decide that any testimony favorable to the defendant would have been perjured, upon a consideration of all the factors enumerated more fully in the accompanying opinion (*United States* v. *Rizzo*, 71 Cr. 436) filed today, the Court concludes that this alleged suppression by the government is not sufficient to merit the granting of a new trial.

Finally, defendant Fragliossi seeks the staying of imposition of sentence pending a Supreme Court decision relative to the mandatory sentence aspects of Title 18,

Appendix C

U.S.C. § 174. The Court in its discretion declines to stay the sentencing.

The Court has had the advantage of hearing and observing the testimony of one Michael Feinberg in two subsequent trials. It is his testimony in these other proceedings which provides the basis for defendant's application for a new trial because of suppressed (and possibly favorable) evidence. However, his testimony is not a part of the instant record. Therefore, to facilitate appellate review, this Court directs that the tapes of Michael Feinberg's conversation with his attorneys, marked as Court's Exhibit 2 and furnished by Herbert Lyon, Esq., and the transcript thereof, the complete examination of Mr. Feinberg in 71 Cr. 437, and the complete examination(s) of Leonard Vecchione be made a part of this record herein on the appeal of this case. This direction is applicable to the appeal of either or both of the defendants in this action.

SO ORDERED.

Dated: New York, New York
January 2, 1973

/s/ LAWRENCE W. PIERCE
U.S.D.J.